IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

SILVER CREEK DRAIN DISTRICT,
a statutory body corporate,

Supreme Court Docket No. 119721

Plaintiff-Appellant,

v

EXTRUSIONS DIVISION, INC.,
a Michigan corporation, and
AZZAR STORE EQUIPMENT, INC.,
a Michigan corporation,

Defendants-Appellees.

Consolidated With

EXTRUSIONS DIVISION, INC.,
a Michigan corporation,

Plaintiff,

v

CITY OF GRAND RAPIDS,
a municipal corporation, and
KENT COUNTY DRAIN COMMISSIONER,
Jointly and Severally,

Defendants.

BRIEF ON APPEAL – APPELLEE
ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS FOR JURISDICTION OF THE SUPREME COURT

The "Statement of the Basis of Jurisdiction of the Supreme Court" in Appellant's brief is complete and correct.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. DOES THE UNIFORM CONDEMNATION PROCEDURES ACT ("UCPA") ALLOW A CONDEMNING AGENCY TO INTRODUCE EVIDENCE OF ENVIRONMENTAL CLEANUP COSTS IN A JUST COMPENSATION TRIAL WHERE THE UCPA PROVIDES SPECIFIC PROCEDURES FOR THE AGENCY TO RECOVER SUCH COSTS AND THE AGENCY HAS WAIVED ITS RIGHTS TO PURSUE RECOVERY UNDER THOSE PROCEDURES?

The Michigan Court of Appeals answered this question: NO

Extrusions answers this question: NO

The Drain District would answer this question: YES

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a condemnation action involving the interpretation of several amendments made to the Uniform Condemnation Procedures Act ("UCPA") in 1993. These amendments addressed the complex issue of how to deal with contaminated property in a condemnation action. Under the environmental laws then in effect, any landowner (including a condemning agency) could be held liable for environmental cleanup costs for a property regardless of whether the landowner was responsible for the contamination. This put governmental agencies at risk whenever they condemned a property. Likewise, landowners were put at risk of having to face – by virtue of an involuntary condemnation – environmental cleanup costs that they might otherwise have avoided indefinitely, if not completely. Both sides faced difficulties in assessing the impact of environmental contamination on the market value of a property, usually because of incomplete or sketchy information.

The Michigan Legislature passed the 1993 amendments to the UCPA to address these issues. These amendments established a sophisticated and balanced scheme which extended certain protections to both the government and landowners. The amendments provided that:

1. At the outset of the action the condemning agency had to either reserve or waive its right to bring a separate cost-recovery action for environmental contamination (MCL 213.55(1) and 4(e)(iv));

2. An agency could petition the court to escrow the funds from the good faith offer as security for a separate cost-recovery action (MCL 213.58(2));

3. The trial court under certain circumstances could force the agency to waive the right to a cost-recovery action and/or to release the escrowed funds (MCL 213.58 (3)); and

4. Certain landowners (homeowners and farmers) would be exempt from any attempt by agencies to collect remediation costs (MCL 213.56a).

These new provisions came into play in this case. The Silver Creek Drain District ("District") filed suit in 1994 to condemn property owned by Extrusions Division, Inc. ("Extrusions"). Since there was some evidence of contamination on the property, the District reserved its right to bring a cost-recovery action and successfully petitioned the trial court to escrow the entire amount of the good faith offer. But the District later waived its right to bring such an action after amendments to the applicable environmental laws made it clear that the District would probably not succeed with a cost-recovery action. The escrowed funds were then released to Extrusions.

That should have ended any issue in this case regarding contamination, but it did not. Two years later, when the just compensation issue finally came to trial, the District reversed course and introduced evidence of environmental cleanup costs as part of its case on fair market value. The trial court admitted the evidence, over the objection of Extrusions, and then simply deducted the estimated cleanup costs from what it had determined to be the fair market value of the property as "clean" (i.e., without contamination requiring remediation). Extrusions appealed.

The Court of Appeals reversed, finding that the plain language and purpose of the 1993 amendments to the UCPA require a condemning agency to pursue the issue of environmental contamination through a separate cost-recovery action, or not at all. The Court of Appeals reasoned that allowing an agency to take the procedural shortcut of simply deducting projected cleanup costs from the fair market value of a property would render the detailed reservation/waiver/escrow scheme of the 1993 amendments meaningless. In addition, the Court of Appeals found that allowing an agency to introduce evidence of environmental contamination at a just compensation trial would rob landowners of important due process rights and defenses

they would have in a cost-recovery action and would inject needless speculation and uncertainty into the determination of fair market value.

The District has now appealed the ruling of the Court of Appeals arguing that, since evidence of contamination necessarily has an impact on market value, it is relevant evidence that must be admitted in a just compensation trial. In addition, the District argues that excluding such evidence could result in an impermissible windfall to property owners.

As will be seen below, neither of these arguments can withstand scrutiny. The Legislature and the courts can, and often do, exclude certain types of evidence (even if arguably relevant) for various policy reasons or where the risks of unfair prejudice outweigh its probative value. The Legislature clearly could, and did, conclude that evidence concerning environmental issues would inject undue speculation into the fair market valuation determination and should best be pursued in a separate action. In addition, excluding such evidence does not prejudice condemning agencies since they retain a remedy for recovering any cleanup costs they incur. Condemning agencies have no inherent right to ignore the UCPA provisions and choose to pursue their remedy for environmental damages in the condemnation case. The Court of Appeals properly interpreted the provisions of the 1993 amendments to the UCPA to require the condemning agency to pursue the issue of environmental contamination through a separate cost-recovery action or not at all. Its decision should be upheld.

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Extrusions purchased Old South Field (the "Property") in 1982 for $106,000 with the intention of using the Property for future expansion of Extrusions' adjacent facility. *Findings of Fact and Conclusions of Law,* November 6, 1997, *Stipulated Facts* ¶¶ 1, 2 and 7, *Findings of Fact* ¶ 1 (Appellant's Appendix, 127a-132a). The Property consisted of eight acres, was zoned for light industrial/warehouse use, but was vacant. *Id.*

Any contamination existing on the Property pre-existed Extrusions' ownership. *Stipulated Facts, above* ¶ 3. All Extrusions did with the Property during its 12 or so years of ownership was to place a chain link fence around the perimeter. *Id* ¶ 7. The only known use of the Property prior to Extrusions' ownership was as "South Field," an athletic field for the (since closed) South High School. *Trial Transcript*, September 24, 1997 at 137-138, September 25, 1997 at 44 (Appellee's Appendix, 81b-82b, and 87b, respectively). Prior to this lawsuit, the Property's sole claim to fame was that, as a student at South High, former President Gerald R. Ford played high school football there.

In late 1991 and early 1992, the time for expansion having arrived, Extrusions drew up plans and applied to the City of Grand Rapids for a building permit. [1] *Stipulated Facts, above,* ¶¶ 5-6. The City of Grand Rapids denied the permit, apparently because it knew the District was considering the site for a storm water retention basin. When Extrusions persisted in

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[1]The District makes much of Extrusions' appeal to the local Board of Review in 1989 for a reduction in the Property's assessed value because of contamination. This appeal, however, was not based solely on suspected contamination on the site, but pointed to several factors, including the need to clear and fill the site before any development could occur. *Trial Transcript,* September 22, 1997 at 25-26 (Appellee's Appendix, 47b-48b). What the District also fails to mention is that the City and Extrusions ultimately agreed on a fair market value of $173,000, even in light of the suspected contamination of the site. In fact, by 1993 the fair market value of the Property as determined by the assessor was $264,600 *as contaminated*, well in excess of the $41,032 the trial court ultimately determined as the fair market value of the Property as of June 29, 1994. *Id; Findings of Fact* ¶¶ 2, 3 and 4 and *Conclusions of Law* ¶ 10 (Appellant's Appendix 129a and 132a).

its attempts to develop the Property, the Kent County Drain Commissioner sent Extrusions a letter stating that, since the District was considering condemning the Property, Extrusions had a duty to mitigate its damages by not developing its land. *Appellant's Brief* at 5. Extrusions waited for six months for something to happen, but when nothing did, it was forced in to file an inverse condemnation case in October 1992, on the theory that the government had effectively taken the Property by not allowing Extrusions to develop it. *Complaint*, October 2, 1992 (Appellant's Appendix, 2a-5a).

Over a year passed. The District continued to defer any decision while it conducted a comprehensive environmental review of the Property, including Phase I and Phase II environmental assessments. *Trial Transcript*, September 24, 1997, at 36-38 (Appellee's Appendix, 65b-67b). Minor contamination was found, primarily arsenic in the soil, which is found in the pesticides and herbicides probably used on the football field.[2] *Id.* at 137-138 (Appellee's Appendix, 81b-82b). The levels (except for one small area where a storage shed was once located) were quite low. *Id.* at 134-138, 147-149 (Appellee's Appendix, 78b-82b and 83b-85b, respectively); *Trial Exhibit K*, Memo of Marc Groenleer at 5-6 and Table 5 (Appellee's

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[2]The District implies that contamination on the Property was severe by referring to the significant cleanup costs that it incurred. These cleanup costs were far in excess of what an ordinary purchaser would have borne. Because the retention basin required large-scale excavation of the Property, the District removed tens of thousands of tons of topsoil and disposed of the topsoil in a qualified landfill. *Trial Transcript*, September 24, 1997 at 23-24 (Appellee's Appendix, 61b-62b). A purchaser for any normal use in that area (zoned light industrial/warehouse) would have simply capped, or paved over, most of the limited area of contamination at a fraction of the District's cost. *Trial Transcript*, September 24, 1997, at 134-136, 147-149 (Appellee's Appendix, 78b-80b, 83b-85b, respectively); *Trial Exhibit K*, Memo of Marc Groenleer at 5-6 and Table 5 (Appellee's Appendix, 37b-38b and 45b-46b, respectively). Even the District's own environmental engineer admitted this. *Trial Transcript*, September 24, 1997, at 76 (Appellee's Appendix, 77b). Since there was no argument that the highest and best use of the Property was as zoned (light industrial/warehouse), the District did not make any claim at trial that it could recover from Extrusions the cost of preparing the Property for a retention basin.

Appendix, 37b-38b and 45b-46b, respectively). In fact, under cleanup standards adopted in June 1995, the contamination in the soil would have been well within acceptable levels and would not have had to be remediated at all.[3]

Finally, in March of 1994, almost two years after the District instructed Extrusions not to develop its Property, the District made a good faith offer to purchase the Property. The offer was for $211,300, which is the amount the District's appraiser valued the Property as "clean" (i.e., without contamination). Under the then recent amendments to the UCPA,[4] the District was required to reserve its rights to pursue damages for environmental cleanup costs in its good faith offer. The District did so and, after it filed its Complaint for condemnation on June 29, 1994, it also successfully petitioned the trial court to place the entire amount of the good faith offer into escrow as security for such cleanup costs. *Order*, May 18, 1995 (Appellee's Appendix, 2b -3b).

In 1995, changes to state environmental laws gave landowners additional protection against cost-recovery actions, and made the recovery of such costs more problematic.

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[3]Changes to the environmental laws in June 1995 recognized that cleanup standards should be different for distinct uses, such as residential and industrial properties. For example, prior to June 1995, acceptable levels of arsenic contamination in topsoil were no more than 720 parts per billion, but after June of 1995, acceptable levels of arsenic in industrial property increased significantly to 100,000 parts per billion. *Compare*, Michigan Department of Natural Resources, MERA Operational Memorandum #8, Revision 3 (February 4, 1994) *with* Michigan Department of Environmental Quality, Environmental Response Division, Soil: Industrial and Commercial II, III, and IV, Part 201 Generic Cleanup Criteria and Screening Levels (August 31, 1999) (attached as Addendum, Exhibits A and B). Arsenic contamination in the top soil of the Property was well within these new limits, so a purchaser of this Property, as it turned out, would have had to do nothing to remediate the minor contamination present. *Trial Exhibit K*, Table 1 (Appellee's Appendix, 40b).

[4]The UCPA was amended in December of 1993 to provide, among other things, that condemning agencies could reserve their right to pursue cleanup costs incurred because of contamination. 1993 PA 308, MCL 213.55, 213.56a, 213.57, 213.58, 213.59. These statutory sections as presently published in the Michigan Compiled Laws are attached as Addendum, Exhibit C.

Significantly, the burden of proof was shifted so that the party seeking recovery of such costs had to prove that the landowner as responsible for, or had contributed to, the contamination found on the property.[5] *Compare*, MCL 299.612a (repealed effective June 5, 1995) *with* MCL 324.20126(1)(a) (attached as Addendum, Exhibits F and G, respectively). Faced with this burden, the District realized it could not prevail in a cost-recovery action against Extrusions because the latter had obviously not used or developed the Property and was clearly not responsible for any contamination on the Property.

Extrusions made a motion to the trial court, as it was allowed to do under the amendments to the UCPA (MCL 213.58) to release the estimated just compensation from escrow. The District did not oppose the motion and, in fact, later specifically waived any right to pursue Extrusions for recovery of cleanup costs. The District stated on the record that "We have no claim any more . . . [a]nd to the extent that that's not clear, I wish to put on the record right

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[5]Even before these amendments, Extrusions would have had defenses to a cost-recovery action. Under the applicable federal and Michigan statutes in effect prior to June 5, 1995, Extrusions would have had available to it the "innocent landowner" defense, a defense that the parties stipulated Extrusions would have met. 42 USC 9601(35)(A) (attached as Addendum, Exhibit D); 42 USC 9607(b) (attached as Addendum, Exhibit E); MCL 299.612a (repealed effective June 5, 1995 and attached as Addendum, Exhibit F); *Findings of Fact and Conclusions of Law, Stipulated Facts* ¶¶ 3-4 (Appellant's Appendix, 128a).

Despite stipulating in the trial court that Extrusions would have satisfied the "innocent landowner" defense, the District now argues in its Brief on Appeal that this defense would not have been available, citing the case of *CPC Int'l Inc v Aerojet General Corp*, 777 F Supp 549, 581 (WD Mich 1991). *Appellant's Brief* at p. 17, n. 5. The District does not inform this Court, however, that the District Court's holding on this issue was reversed by the 6th Circuit in *United States v Cordova Chemical Co of Mich*, 113 F3d 572, 583 (6th Cir 1997), *vacated in non-relevant part by United States v Bestfoods,* 524 US 51; 118 S Ct 1876, 1884 n 7; 141 L Ed 2d 43 (1998). The effect of the reversal by the 6th Circuit means that a party cannot be held liable for environmental contamination under CERCLA simply by being part of the chain of title for the property. Rather, for liability to attach, the party must have some actual responsibility for the action which gave rise to the contamination.

now . . . we will never sue them for cleanup costs." *Transcript of Motion in Limine*, June 13, 1997 at 11-12 (Appellee's Appendix, 14b-15b).[6]

When the just compensation trial finally arrived, however, the District reversed course and re-injected the issue of cleanup costs back into the case. The District now argues that it introduced such evidence merely as part of the proofs on the fair market value of the Property. But that is not at all how the evidence came in.

Both sides presented testimony from a real estate appraiser. Both of these appraisers valued the property "as clean," since both of them conceded they had no expertise or basis on which to measure the extent or impact of any environmental contamination on the market value of the Property. *Trial Transcript,* September 22, 1997, at 64-66 and 73-74 (Appellee's Appendix, 53b-57b); *Trial Transcript*, September 23, 1997, at 45 (Appellee's Appendix, 60b). The District's appraiser valued the Property at $211,300, Extrusions' appraiser placed a value at $346,300. *Findings of Fact and Conclusions of Law*, November 6, 1997, *Findings of Fact* ¶ 5 (Appellant's Appendix, 129a). The trial court, without any analysis, simply picked the mid-point of these two numbers, and found the market value of the Property, as clean, to be $278,800. *Id.*

The District then introduced testimony from an environmental engineer, who had no expertise in appraising property, as to the cost of an environmental cleanup to a "Type B" or

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[6]This hearing was on Extrusions' motion in limine to exclude testimony as to the effect of the environmental contamination on the fair market value of the Property, a motion the trial court denied. *Transcript of Motion in Limine*, June 13, 1997 at 8, 24-25 (Appellee's Appendix, 11b and 27b-28b, respectively). Appellant's argument that Extrusions did not properly preserve its objections, therefore, is factually inaccurate. *See also, Conclusions of Law*, November 6, 1997 ¶ 8 (Appellant's Appendix, 131a) (rejecting Extrusions' argument that environmental contamination could not be taken into account because Extrusions was not liable under applicable environmental laws). In addition, the District never raised this argument in the Court of Appeals, which bars the issue from review in this Court. *Booth Newspapers, Inc v University of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993).

"Type C" cleanup standard, according to criteria in effect on June 29, 1994.[7] Extrusions countered with its own environmental engineer who testified that a "Type C" cleanup would cost significantly less than the amount calculated by the District's environmental engineer.[8] Neither environmental consultant gave an opinion as to the fair market value of the Property as contaminated. The trial court then concluded that a reasonable buyer would have required the Property to be remediated to a point where a "Type C" closure letter could be obtained from the state, even through the District had presented no evidence that buyers of similar properties in the area had required such cleanups or closure letters before the sale of such properties. The trial court then, again with no analysis, simply picked $237,768 as the cleanup cost (which was the midpoint between the higher of the two figures put forth by Extrusion's expert and the figure put forth by the District's expert), and deducted this cleanup cost from what the trial court had determined to be the fair market value of the Property as clean. *Findings of Fact and Conclusions of Law*, November 6, 1997, *Findings of Fact* ¶ 6 and *Conclusions of Law* ¶¶ 9 and 10 (Appellant's Appendix, 129a and 132a). The trial court found the resulting number, $41,032, to be the market value for the Property, despite the fact that there was no evidence or testimony on the record that this was within the range of fair market value. *Id.*

This approach is precisely the method which has been deemed unacceptable by the Appraisal Standards Board: "The value of an interest in impacted or contaminated real estate

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[7]Type C cleanup standards were less stringent than Type A (no contamination beyond background levels) or Type B (residential) standards, but still would have required a cleanup plan acceptable to the Department of Natural Resources (now Department of Environmental Quality) and a completion of that plan before a closure letter could be obtained. As noted above in fn. 3, after the law changed in June of 1995, significantly relaxing cleanup standards for industrial/warehouse properties of this sort, no remediation at all would have been necessary at this site.

[8]Extrusions presented such evidence only after failing to exclude the issues of environmental contamination from the trial entirely.

may not be measurable by simply deducting the remediation or compliance cost estimate from the estimated value as if unaffected." Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice* (The Appraisal Foundation, 2000), AO-09 (attached as Addendum, Exhibit H). The leading treatise on eminent domain states that this approach is only appropriate were the property is taken for the express purpose of cleanup. 7A Nichols on Eminent Domain (Dec 2001) § 13B.04(2)(c) (attached as Addendum, Exhibit T).

Extrusions appealed this ruling to the Court of Appeals, which reversed and remanded this case to the trial court. The Court of Appeals held that the UCPA allowed an agency a specific venue for recovery of cleanup costs – a separate cost-recovery action. The District, having waived its rights to pursue such an action, was not free to introduce evidence of cleanup costs as part of the just compensation determination. The District now seeks reversal of this ruling.[9]

ARGUMENT

The Court of Appeals correctly concluded that the statutory scheme established by the Legislature through the 1993 amendments to the UCPA separates the "just compensation" and environmental "cost-recovery" actions so that environmental contamination is not included in the fair market value analysis. This scheme protects agencies and owners, and in addition recognizes the great difficulties inherent in appraising contaminated property. The Court of Appeals' decision, then, should be affirmed.

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[9]Extrusions also appealed the trial court's ruling with regard to the determination of fair market value of the Property as clean (i.e., before the trial court reduced it by the estimated costs of cleanup) and the lack of damage to Extrusions' remaining parcel. The Court of Appeals upheld the trial court on these issues, which are not part of this appeal.

I. THE COURT OF APPEALS CORRECTLY INTERPRETED THE 1993 UCPA AMENDMENTS TO EXCLUDE EVIDENCE OF CONTAMINATION FROM THE JUST COMPENSATION ANALYSIS

In 1993 the Legislature amended the UCPA to establish a two-step procedure for dealing with contamination in the condemnation context: (i) at the time the agency makes the good faith offer it must either reserve or waive its right to bring a cost-recovery action regarding any contamination on the property, and (ii) the agency, if it reserves its right, may petition the court to allow the good faith offer to be placed in escrow pending the outcome of any cost-recovery action. These amendments were added with the specific intent to remedy the problems faced by both condemning agencies and by owners in the condemnation context.

A. The UCPA Must Be Construed In Favor of the Landowner

Legislative intent is the touchstone of statutory interpretation and the primary goal of judicial interpretation of statutes is to ascertain and give effect to such intent. *Frankenmuth Mut Ins Co v Marlette Homes*, Inc, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of a statute is clear, then the legislative intent is plain and judicial construction is not permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 713, *lv held in abeyance Cherry Growers, Inc v Michigan Processing Apple Growers*, __ Mich __; 624 NW2d 186 (2001), *lv den* 465 Mich 888; 636 NW2d 141 (2001).[10]

However, when reasonable minds may differ with respect to the meaning of a statute and judicial construction is necessary, a court must follow a two-step procedure: (i) ascertain the object of the statute, in light of the harm it is designed to remedy, and (ii) apply a

[10]As the District correctly states in its Brief, the issue of statutory interpretation is a question of law subject to *de novo* review. *Putkamer v Transamerica Ins Co of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

reasonable construction that best accomplishes the Legislature's purpose. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1997). "In this endeavor, a court should not abandon the canons of common sense." *Id.*

In the context of condemnation, it is important to note that the UCPA is a remedial statute which must be strictly construed against the government and in favor of the landowner. "The law of eminent domain is a harsh remedy necessitating a strict construction of and compliance with eminent domain statutes" on the part of the agency. *C&O Railway Co v Herzberg*, 15 Mich App 271, 277; 166 NW2d 652 (1968). "The party whose property is being taken by eminent domain is entitled to the utmost protection of the Courts since the exercise of such power is drastic and should be construed in favor of the displaced landholder." *City of Muskegon v Irwin,* 31 Mich App 263, 268; 187 NW2d 481 (1971).

In our case, as discussed below, the Court of Appeals properly determined that the plain meaning of the 1993 amendments, the object of the amendments, and the harm they were designed to remedy in the condemnation context mandates that the only reasonable construction is one which excludes evidence of environmental contamination from the determination of just compensation.

B. Prior to the Amendments Both Owners of Contaminated Properties and Condemning Agencies Faced Significant Risks in the Condemnation Context

As environmental issues exploded in the late 1980s and early 1990s, they posed a special challenge in the condemnation arena -- to the condemning agency, to the owner, and to their appraisers.

The condemning agency, in the typical case, would not know the environmental condition of the property before making its good faith offer. In some cases, it might have done some environmental investigation, such as a title search ("Phase I") or soil borings and water

samples ("Phase II"). Regardless of the level of investigation, the agency ran the risk of either missing possible environmental contamination or under-estimating the cost of cleaning up such contamination and thus over-valuing the property in its good faith estimate of value. If, on the other hand, the agency significantly under-valued the property, it faced protracted litigation and the potential penalty of paying the owner's attorneys' fees and costs (which are taxable to the agency under the UCPA). In addition, if the agency's offer were accepted, it could become responsible for an environmental problem it had not created. Finally, once the money was paid to the owner, there was no guarantee the agency could later recover those funds through a cost-recovery action. Unlike buyers of contaminated property in the marketplace, under the "quick take" provisions of the UCPA the condemning authority could not place funds in escrow pending cleanup. All of these risks posed a threat to the public treasury. *See discussion in*, House Legislative Analysis, HB 4719, May 6, 1993; House Legislative Analysis, HB 4719, June 16, 1993; House Legislative Analysis, HB 4719, April 8, 1994 (attached as Addendum, Exhibit I).

Owners, on the other hand, faced a different set of risks. A condemnation action forced them to face environmental issues and cleanup costs which they might otherwise not have to face for years, if ever. In the marketplace, an owner could wait to sell or develop his property until a relaxation of the relevant environmental standards (which in our case occurred in June of 1995) or develop the property in such a way as to minimize cleanup costs (which was also possible in our case). In addition, owners also faced the uncertain prospect that, perhaps years after the condemnation, they might be confronted with a cost-recovery action and potentially large liabilities, whereas in the market they could negotiate for release and indemnification provisions. *See, e.g., Detroit v A W Miller, Inc*, 842 F Supp 957 (ED Mich 1994) (after city condemned property in 1987, city sued condemnees in 1993 to recover costs city had incurred in cleaning up environmental contamination); *see also discussion in*, House Legislative Analysis,

HB 4719, June 16, 1993; House Legislative Analysis, HB 4719, April 8, 1994 (Addendum, Exhibit I). Finally, introducing evidence of contamination into the just compensation analysis deprives the owner of the defenses it would have in a cost-recovery action such as the "innocent landowner" defense (which the parties concede Extrusions would have met).

The Legislature also recognized that injecting environmental issues into the just compensation determination raises difficult issues. An appraiser, in fact, faces two separate problems in valuing the contaminated property. First, the appraiser needs to know all of the necessary "facts" about the contamination at the time the appraiser makes the good faith estimate of value.[11] At the time of the good faith offer, however, these "facts" may be entirely unknown, or at best mere educated guesses based on "Phase I" and "Phase II" investigations on the property. In fact, according to the District's own environmental expert, the process of adequately identifying and analyzing contamination and planning for the cleanup alone takes more than a year. *Trial Transcript*, September 24, 1997 at 46-48, 50-51, 53-56 (Appellee's Appendix 68b-76b). At the time the good faith offer is made (and perhaps even at the time of the just compensation hearing) no actual cleanup has occurred. At most, title records have been reviewed for evidence of prior ownership by a likely contaminator (such as a gas station) and random soil borings and water samples have been analyzed for contamination. From this limited

[11]In its *amicus curiae* brief, the Michigan Department of Transportation ("MDOT") states that the "facts" that must be known to properly appraise contaminated property include: "(1) whether any cleanup is necessary, (2) the type of cleanup needed, (3) the cost of the cleanup, (4) when the cleanup will be needed, (5) the availability of governmental funding to pay some or all of the costs, (6) the availability of governmental waiver or special treatment to facilitate economic development," (7) how much it would cost to clean the property for use as it highest and best use, and (8) whether the property should be valued at a lower use with a corresponding lesser level of clean up. *MDOT's Amicus Curiae Brief* at 12-13. The MDOT's list, as lengthy as it is, is incomplete. The appraiser would also need to know (1) whether there is a collectible polluter, (2) whether a private buyer would qualify for federal income tax deductions, (3) whether the market sniffed a change in the air regarding cleanup standards and whether that should be reflected in the market value, and (4) whether the market would stigmatize the property even after cleanup.

information the environmental technician must extrapolate the "facts" necessary for the appraiser to value the contaminated property -- such as the extent of the contamination, to what extent it needs to be cleaned up, the likely cost of cleanup, the type of contamination, etc. This is largely guesswork at this stage of a just compensation trial.[12]

The second problem is actually applying the "facts" known about the contamination to the art of appraisal of real property. Most appraisers will not even try. In fact, in this case, the District's own appraiser specifically valued the Property as "clean" and disclaimed any ability to determine the market value of the Property as contaminated. *Trial Transcript*, September 22, 1997 at 64-66, 73-74 (Appellee's Appendix 53b-57b). While there may be appraisers who are willing to give an opinion, the Court of Appeals correctly reasoned that such appraisals are speculative at best because the foundation of the appraiser's art – the analysis of sales of comparable properties – breaks down when contaminated property is involved. *Silver Creek Drain District v Extrusions Division, Inc,* 245 Mich App 556, 567; 630 NW2d 347, *lv gtd* 465 Mich 859; 644 NW2d 761 (2002). "Contaminated properties are like snowflakes; no two are alike." *Id.* This means that both parties are put at great risk because the appraisers are required to apply the guess-work of the environmental technician to the appraisal of the property without using the sales of comparable properties as either the basis of the valuation or as a correcting factor. The District's own appraiser acknowledged that the "sales comparison" approach is the only appropriate valuation method for vacant property. *Trial Testimony*, September 22, 1997, at 49-50 (Appellee's Appendix, 50b-51b). In other words, in the appraisal of contaminated property, guess-work is heaped upon guess-work. The leading

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[12]This is in sharp contrast to a cost-recovery action, where the Legislature mandated that environmental issues be resolved. In such an action, the cleanup has, in all likelihood, already taken place, and the extent of contamination and cleanup expense are known facts.

treatise on eminent domain has concluded that "even the experts find it difficult to appraise contamination. Since the conditions and circumstances of each case are unique and environmental testing is fallible, experts predictably disagree on the question of value." 7A Nichols on Eminent Domain (Dec 2001) § 13B.04(1)(a) (Addendum, Exhibit T).[13]

In addition to the difficulty in comparing contaminated properties, there is simply a lack of market data for such properties. This is because private buyers and sellers of contaminated property typically deal with contamination issues, not through adjustments of purchase price, but with negotiated indemnity provisions or purchased insurance policies. For example, "Cleanup Cost Cap Insurance" protects a buyer who acquires contaminated property before the cleanup of known contaminants is complete. Hernandez, *A Practical Guide to Environmental Insurance Brownfields Transactions* 476PLI/Real 515 (2001) (attached as Addendum, Exhibit J). "Pollution Legal Liability Insurance" protects a buyer from claims arising from unknown conditions or problems. *Id.* While such indemnity provisions and insurance policies are available to the private seller and buyer, they are typically not part of a sale forced through condemnation. Because real world transactions of contaminated properties typically deal with environmental issues, not through an adjustment of purchase price, but through these practical approaches of indemnity provisions and insurance, comparable transactions, measuring the market impact of contamination are simply unavailable.[14]

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[13] This situation is therefore very different from what the District and MDOT argue is a typical situation of adjusting comparables. Their argument is that an adjustment for contamination is simply like adjusting for a building with a bad roof. But in that situation, the extent of damage and costs of repair are known facts, whereas in the contamination context they are pure speculation at the just compensation stage.

[14] "In condemnation of contaminated property, valuation may be so unlike the market as to be speculative; e.g., market transactions re contaminated property nearly always involve some indemnity between buyer and seller re contamination risks/costs. . . . [G]overnment, when it compels sale by eminent domain, cannot directly compel indemnity by condemnee. . . . [S]hould government be given the statutory right to compel indemnity as part of [the] condemnation

The Michigan Legislature was presented with this complex series of issues posed by the condemnation of contaminated properties in 1993. The Legislature's answer was to establish the reservation/waiver/escrow scheme.

C. The Legislature Establishes the Reservation/Waiver/Escrow Scheme to Solve Each of the Agency's, Owner's and Appraiser's Problems

Recognizing the special difficulties faced by the presence of environmental contamination in the area of condemnation, the Legislature as part of a larger package of "brownfield" redevelopment bills amended the UCPA to separate the just compensation determination from the environmental contamination issue and require the parties to litigate environmental contamination issues in a separate cost-recovery action.[15] Under the 1993 amendments, the Legislature (i) required the agency to reserve or waive its right to a cost-recovery action in its first correspondence with the owner; (ii) allowed the agency, in the case of reservation, to place the good faith offer in escrow pending the outcome of the cost-recovery action; (iii) allowed the owner to challenge the escrow under certain circumstances; and (iv) protected certain classes of landowners (homeowners and farmers) from any environmental liability to a condemning agency. *See discussion in*, House Legislative Analysis, HB 4719, June 16, 1993; House Legislative Analysis, HB 4719, April 8, 1994 (Addendum, Exhibit I).

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process?" McMurry & Pierce, *Environmental Contamination and its Effect on Eminent Domain*, ALI-ABA 133, 169 (1993), *quoted in* 7A Nichols on Eminent Domain (Dec 2001) § 13B.04 n 9 (Addendum, Exhibit T).

[15]This package of four "brownfield" redevelopment bills grew out of recommendations made by a citizens advisory group that had been appointed to examine the impact of state environmental laws and policies on urban sprawl and to review approaches for the re-use of contaminated urban properties. *See discussion in,* House Legislative Analysis, HB 4719, April 8, 1994 (Addendum, Exhibit I). All four of these bills were passed into law at the same time in late December of 1993, and signed into law by Governor Engler on Christmas Eve. These bills in their Public Act form are attached as Addendum, Exhibit K.

Specifically, the Legislature amended Section 5 of the UCPA to provide that the condemning authority must either reserve or waive its right to bring "federal or state recovery actions against the present owner arising out of a release of hazardous substances at the property" in the good faith offer, the appraisal, and the declaration. MCL 213.55(1) and (4)(e)(iv). For the agency, this means that it does not have to take a stab in the dark at valuing suspected contaminated property in the good faith offer and appraisal. It can merely reserve its right to find out, after due investigation, whether and to what extent the property is contaminated and whether the owner is the party responsible. Once it has all of the information it needs, the agency can bring a cost-recovery action. For the owner, this means that right from the beginning of the condemnation process it is aware of whether the condemning authority considers the property potentially contaminated and the owner a potentially responsible party.

The Legislature also added Section 6a to provide that if the condemning authority chooses to reserve the right to bring a cost-recovery action, the owner, under certain circumstances, may ask the court to reverse that reservation. MCL 213.56a(1). In effect, the Legislature simply exempted two classes of owners from liability for cost-recovery actions -- homeowners and farmers (where the claimed contamination is from substances associated with generally accepted agricultural management practices). *Id.* Such owners, along with a commercial or industrial owner who admits responsibility for the contamination, can petition the court to order a waiver of a cost-recovery action against them. *Id.*

Finally, the Legislature amended Section 8 to allow the condemning authority to place the good faith offer in escrow "as security for cleanup costs of environmental contamination on the condemned parcel." MCL 213.58(2). The Court may break the escrow and distribute all or a portion of the money to the owner if, among other things, "a court issues an order of apportionment of remediation responsibility." MCL 213.58(3)(e). For example, the

owner is entitled to the funds in escrow where he has been adjudged not liable for the contamination through a separate cost-recovery action or where the cost of cleanup is known to be less than the amount in escrow.

The leading treatise in the area of eminent domain calls this type of scheme a "trust" or "escrow" system and describes it as follows:[16]

> Under the trust or escrow approach, *evidence of contamination is excluded from the eminent domain valuation trial*, which is directed toward determining full compensation for the property as if it were uncontaminated. However, the full award is not paid directly to the owner; rather, a sufficient portion to cover cleanup costs is escrowed or held in trust until these costs have been determined. Once determined, the amount of the cleanup *costs for which the owner is liable* is then disbursed form the trust or escrow for cleanup. Only the surplus, if any, is paid to the owner. 7A Nichols on Eminent Domain (Dec 2001) § 13B.03(4) (emphasis added) (attached as Addendum, Exhibit S).

The purpose of the "trust" or "escrow" scheme is to balance the competing risks and liabilities of the parties to a condemnation action by (i) mirroring what buyers and sellers do in the marketplace, (ii) allowing the condemning agency's appraisers the simpler job of appraising the property as clean, but then keeping the funds in escrow pending cleanup, and (iii) protecting the owner 's rights to due process by requiring that cleanup costs be assessed against the owner only to the extent that the owner is actually liable under the environmental statutes for such cleanup costs. *Id.*

This scheme is similar to what a private buyer and seller would do if a parcel of property is encumbered with a construction lien that the seller believes is invalid. The parties

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[16]In 1998, California adopted a "trust" or "escrow" scheme similar to Michigan's that requires that suspected contaminated property be appraised as clean, and that the funds otherwise owed the landowner be placed in escrow pending cleanup and determination of liability. *See, e.g.,* Cal Civ Proc Code 1263.720 and 1263.740 (attached as Addendum, Exhibit L). California, however, does not have a "uniform" condemnation statute such as Michigan's that applies to all condemnations, and therefore California's "trust" or "escrow" scheme is limited to condemnations undertaken by school districts.

would value the property without the lien, place a sufficient portion of the purchase price in escrow to cover the lien, and allow the seller and the construction lien claimant to resolve the issue of the validity of the lien in a separate forum.[17] If the seller prevails, it gets the money in escrow. If the construction lien claimant prevails, it gets the money. This is precisely the way a "trust" or "escrow" condemnation scheme such as Michigan's works. A sufficient portion of the "purchase price" is placed in escrow pending a determination in a separate lawsuit of the "seller's" liability for the "environmental lien." If the "seller" prevails, it gets the money. If not, the party asserting a "lien" for cleanup gets the money.

Michigan's statutory "trust" scheme of reservation/waiver/escrow addresses and resolves the problems of the agency, the owner and the appraiser that were recognized by the Legislature.

1. The 1993 Amendments Protect the Condemning Agency

The 1993 amendments protect the condemning agency by excluding environmental contamination from the good faith estimate of value and from the just compensation analysis. Under these amendments, the agency no longer needs to confront the dilemma of addressing suspected contamination on the property with imperfect information, which could end up with the agency underestimating or overestimating the effect on market value. It also allows an agency to exercise the authority granted it by the UCPA to do a "quick take." Because the process of identifying, analyzing, and cleaning up contamination is such a long process, waiting to complete this work would have the practical effect of voiding the "quick take" authority agencies have (and need) under the UCPA.

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[17]The private seller and buyer might also, of course, arrange for the purchase an insurance policy – a bond – to cover the lien, much like a private seller and buyer of contaminated property might arrange for the purchase of the "Cleanup Cost Cap Insurance" or the "Pollution Legal Liability Insurance" discussed above.

The amendments also protect the agency by allowing it to place the good faith deposit in escrow pending the determination of cleanup costs. Without these amendments the agency could end up incurring extensive cleanup costs for which it would never receive reimbursement from the owner. The escrow gives the agency a ready pool of money available to indemnify it for its cleanup costs.

2. The 1993 Amendments Protect the Owner

The 1993 amendments protect the owner by requiring that any cost-recovery action be tried separately under the environmental laws.

This separation of the issues allows the owner to raise available defenses to liability. As the Court of Appeals recognized, imposing environmental liability on an innocent owner, such as Extrusions, through the just compensation analysis violates the owner's right to due process of law. US Const, Ams V and XIV; Const 1963, art 10 § 2 (both attached as Addendum, Exhibit M). The statutory scheme adopted by the Legislature in the 1993 amendments protects these rights.

For example, among other defenses, Extrusions would have had available to it in any cost-recovery action the "innocent landowner" defense under the applicable Michigan and federal environmental statutes in effect prior to June 5, 1995.[18] 42 USC 9601(35)(A) (Addendum, Exhibit D); 42 USC 9607(b) (Addendum, Exhibit E); MCL 299.612a (repealed

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[18] Under the "innocent landowner" defense available at the time of taking, a party had to show that it was not responsible for the contamination, that some unrelated third party was responsible, that it exercised due care regarding any hazardous substances, that it took appropriate precautions against the third party's foreseeable acts, and that it performed an appropriate environmental due diligence when it purchased the property and did not discover the contamination. After June 5, 1995, the state environmental statutes were amended to expand the protections for innocent landowners. Now, the party seeking cost-recovery must show that the property owner was actually wholly or partially responsible for the contamination. MCL 324.20126(1)(a).

effective June 5, 1995) (Addendum, Exhibit F). The parties stipulated that Extrusions would have met this "innocent landowner" defense. *Findings of Fact and Conclusions of Law, Stipulated Facts* ¶¶ 3, 4 and 7 (November 6, 1997) (Appellant's Appendix, 128a). Although the parties stipulated to the fact that Extrusions met these requirements, the District was nonetheless able to convince the court to allow it to collect cleanup costs from Extrusions by deducting them from the fair market value determination.

This is such a blatant end run around due process protections that courts in other states, even without a statutory scheme similar to Michigan's, have acted independently to protect an owner's right to due process of law. Both the Iowa Supreme Court and the Illinois Court of Appeals, for example, held that such evidence is inadmissible because, among other things, admission would violate the property owner's right to due process. *Alladin, Inc v Black Hawk County,* 562 NW2d 608, 615 (Iowa 1997) ("If such cleanup costs are admissible and considered by a [condemnation] compensation commission without the procedural safeguards in [the environmental statutes], the procedural due process rights of the property owner are violated. A property owner has a right to have its liability established in a legal proceeding in which the owner has the opportunity to show that the owner did not cause the water pollution or hazardous condition."); *Dep't of Transportation ex rel People v Parr,* 259 Ill App 3d 602, 607; 633 NE2d 19, *app den* 157 Ill 2d 497; 642 NE2d 1276 (1994) ("[W]e conclude that the admission of remediation costs at an eminent domain proceeding violates the rights of property owners to have their potential liability properly adjudicated in a proceeding under the Act with the attendant procedural safeguards.").

In our case, the Court of Appeals recognized this injustice: "The inequity is especially evident in this case where the drain district admits it chose not to incur the cost of attempting to prove Extrusions' liability for the contamination and unequivocally stated it did not

intend to bring a cost recover action against Extrusions." *Silver Creek Drain Dist*, 254 Mich App 556 n 10.

In addition, bifurcating the just compensation and environmental liability determinations ensures that the landowner is placed in the same position it would have been but for the taking. *Wayne Co v Britton Trust*, 454 Mich 608, 622; 563 NW2d 674 (1997). Bifurcation reduces the guesswork inherent in valuing contaminated property and ensures that the landowner is not dunned twice for the contamination. The landowner is entitled to the market value of its property based upon the "relevant facts." *Petition of Mackie*, 362 Mich 697, 699; 108 NW2d 755 (1961). As discussed above, valuing contaminated property is a complex matter given that many of the "relevant facts" aren't known (and in some cases not even knowable) and that the private marketplace deals with contamination through indemnifications and insurance policies. Simply deducting estimated cleanup costs (as the trial court did in our case) is impermissible. Moreover, bifurcation ensures that the landowner is not held liable twice – once at the just compensation trial and later in a cost-recovery action. *See, e.g., Detroit v A W Miller, Inc,* 842 F Supp 961 (city condemned property in 1987, city sued condemnees in 1993 to recover costs city had incurred in cleaning up environmental contamination, court rejected condemnee's defense of *res judicata* to this subsequent cost-recovery action). The complexity of the valuation issue and the landowner's ongoing potential liability for a cost-recovery action is another reason why, for example, the Iowa Supreme Court acted independently of any statutory authority such as Michigan has to separate the environmental and just compensation issues. *Alladin,* 562 NW2d 615-616.[19]

[19]Furthermore, the "project influence" rule which bars consideration of the effect of the condemnation project on the condemned property is observed, rather than breached, when the just compensation and environmental liability determinations are bifurcated. *State Highway Com'n v L & L Concession Co*, 31 Mich App 222, 226-227; 187 NW2d 465 (1971) ("It is an established rule of condemnation law that the value of an interest in property is to be determined

3. Excluding Contamination from the Just Compensation Analysis Solves the Appraisal Problem

Excluding contamination from the just compensation analysis also solves the appraisal problem, both at the time of the good faith offer and at trial. As the Iowa Supreme Court recognized, contaminated properties "involve multiple varieties of contamination of varying concentrations and require assorted methods of cleanup," making it almost impossible to find a comparable parcel of property comparably contaminated. *Alladin*, 562 NW2d 616. Because of this complexity, the Iowa Supreme Court has called the valuation of contaminated property "speculative" and has cited this as one reason (apart from the due process concerns) for separating the "just compensation" determination from the environmental liability determination. *Id.* The Michigan Court of Appeals agreed, noting that "[c]ontaminated properties are like snowflakes; no two are alike." *Silver Creek Drain District,* 245 Mich App 567. The Michigan Legislature also recognized the inherent speculative nature of cleanup costs when it provided in the 1993 amendments to the UCPA that the court could hold in escrow the "*likely* costs of remediation if the property were used for its highest and best use." MCL 213.58(2), as amended by 1996 PA 474; MCL 213.58(1), as amended by 1993 PA 308. The District's own appraiser, when presented on cross-examination with a comparable parcel of property in Grand Rapids that was also contaminated, denied that it could be used as a comparable because, among other things, it was contaminated. *Trial Testimony*, September 22, 1997, at 95-96 (Appellee's Appendix, 58b-59b). Not surprisingly, the District's appraiser was unwilling to use as a

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without regard to any enhancement or reduction of the value attributable to condemnation or the threat of condemnation."); *see also* MCL 213.70. "Where contamination is found by the condemnor, its impact on market value is a result of the project and should be excluded. Similarly, even if there is known contamination prior to condemnation, alleged market 'stigma' should be inadmissible because the condemnation project forces the condemnee to sell while the property is perceived as 'dirty.'" Boulris, *Dealing with Contaminated Land from the Condemnee's Perspective*, ALI-ABA 197, 202-203 (1995), *quoted in* 7A Nichols on Eminent Domain (Dec 2001), §13B.03 n 30 (Addendum, Exhibit S).

comparable a contaminated parcel of property because he simply had no expertise to determine whether the contamination was "comparable". He also did not know what indemnification or insurance provisions the parties might have provided for in their contract.

Separating out the issue of contamination allows appraisers do what they do best -- appraising clean parcels of property using the comparable sales approach either as the foundation or as a correcting factor to the appraisal. It also allows the court hearing the cost-recovery action to assess the appropriate level of liability against the owner, not by reference to dubious fair market valuations, but by reference to the environmental statutes that have been enacted for this very purpose.

4. Separating the Just Compensation and Environmental Liability Determinations Resolves Other Vexing Procedural Issues As Well

Separating the just compensation and environmental liability determinations resolves other vexing procedural issues as well that arise when the two determinations are merged. For example, eminent domain actions are *in rem* but environmental liability determinations are *in personam*. MDOT inexplicably argues that for this reason contamination should be included in the just compensation analysis as it has an effect on market value. Actually, this argument cuts the other way -- in favor of interpreting the 1993 UCPA amendments as excluding evidence of contamination -- because it shows that, without the reservation and waiver system, the agency could take the property at a reduced value as contaminated (an *in rem* proceeding) and then turn around and sue the owner for cleanup costs (in an *in personam* action) and never be subject to the defenses of collateral estoppel or *res judicata*. *See, e.g., Detroit v A W Miller, Inc,* 842 F Supp 961 (rejecting condemnee's defense of *res judicata* to subsequent cost-recovery action). The Legislature wanted to protect the owner

from such double liability, and thus established the reservation and waiver system through the 1993 amendments.

In addition, the federal courts have exclusive original jurisdiction over cost-recovery actions brought under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (*see*, 42 USC 9613(b), attached as Addendum, Exhibit N), and by importing environmental liability into the just compensation analysis the state court may be apportioning CERCLA response costs in violation of the federal courts' exclusive jurisdiction. Furthermore, there is no right to a jury trial in federal CERCLA cost-recovery actions because it is considered an equitable action (7A Nichols on Eminent Domain (Dec 2001) § 13B.03(4) (Addendum, Exhibit S)), but there is, of course, a right to a jury trial in a just compensation determination. Moreover, there is no procedure in the UCPA for the owner to implead the third party polluters and bring them all before the Court for a liability determination in the context of a just compensation trial. Even MDOT acknowledges this. *MDOT'S Amicus Curiae Brief* at 8. Finally, the burden of proof as to necessary cleanup actions and costs is different. In a condemnation case each party bears the burden of providing its contention as to value. *Charter Tp of Delta v Eyde*, 40 Mich App 485, 489; 198 NW2d 918, *remanded in non-relevant part* 389 Mich 549; 208 NW2d 168 (1973). If cleanup costs are considered in a just compensation analysis, each party would bear the burden of proving that its contention of cleanup actions and costs is correct. Under CERCLA, however, it is the party seeking recovery that bears the burden of proof. *Detroit v AW Miller, Inc,* 842 F Supp 960; *see also Appellant's Brief* at 16-18 (discussing the various elements a party must show under CERCLA and Michigan's (now repealed) Act 307 to recover cleanup costs).

Separating the just compensation and environmental liability considerations resolves these issues as well.

D. The Court of Appeals Properly Interpreted the UCPA in Giving Effect to its Plain Language and Intended Purpose

The Court of Appeals, in properly interpreting the 1993 amendments to the UCPA, looked both to the plain language of the statute, the object of the statute and the harm it was intended to remedy. *Silver Creek Drain District*, 245 Mich App 562-563; Section I.A., *above*. The Court of Appeals noted that when the UCPA was enacted in 1980 it was silent as to the prospect of environmental contamination and its effect on the condemnation process. Soon thereafter, however, courts were flooded with environmental contamination lawsuits, and the 1993 amendments were adopted against this background "to incorporate procedures addressing the potential of liability arising from cleanup costs of property subject to acquisition through the exercise of eminent domain." *Id* at 564.

The procedures adopted by the Legislature incorporated the reservation/waiver/ escrow scheme set forth in Sections 5, 6a and 8 of the UCPA. Condemning agencies are required (not permitted) to follow these procedures in dealing with environmental cleanup issues. They are therefore not free, according to the Court of Appeals, to inject such issues into the determination of just compensation. To allow agencies this alternative would deprive the reservation/waiver/escrow scheme of any meaning. As stated by the Court of Appeals, "There would be no purpose to these amendments if a court, in the process of determining just compensation, could simply deduct remediation costs from the fair market value of the property." *Id* at 565.[20]

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[20]The District spends a great deal of time in its appeal brief arguing that a cost-recovery action under the applicable environmental statutes is a great deal different than what the trial court engaged in here, which it argues was simply an attempt to determine the impact on market value of environmental contamination. This argument ignores what actually happened. As was seen in the *Counter-Statement of Material Facts and Proceedings, above*, there was no evidence at the just compensation trial regarding the impact of contamination on market value. The appraiser did not address it, and the environmental experts gave no opinions as to value. What happened, as a practical matter, was that the landowner was held liable for estimated cleanup

The Court of Appeals further found that the approach adopted by the Legislature, to separate the issues of environmental contamination from determinations of market value, made sense and was consistent with the major purpose of the UCPA: to place the landowner in as good a condition as it would have been had the taking not occurred. *Id* at 567, *citing Britton Trust*, 454 Mich 622. The Court of Appeals concluded that allowing environmental issues into the just compensation phase would defeat this purpose for two reasons. First, allowing evidence of remediation costs would rob the landowner of procedural defenses it would have had in a cost-recovery action. Second, allowing evidence of environmental contamination would introduce undue speculation into the fair market value determination. The Court of Appeals noted that environmental issues tend to be unique, making it difficult to measure the impact of contamination on market value. "Contaminated properties are like snow flakes; no two are alike. Thus, it is virtually impossible to find a comparable parcel of property on which to base an estimation of value." *Id.* The Court of Appeals also found that the particular method employed by the trial court in this case – simply deducting the estimated remediation costs from the market value of the property – was clearly inappropriate and not in accordance with accepted appraisal practice. *Id* at 567-568.

The Court of Appeals concluded, therefore, that the only proper method for dealing with issues of environmental contamination is to separate such issues from the determination of just compensation. To this end, the Legislature set up the separate reservation/ waiver/escrow scheme, and did not intend to give agencies the option of addressing environmental issues in the just compensation trial after waiving their rights to pursue a cost-recovery action.

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costs for which, absent the taking, would never have been incurred and for which it could not have been held liable under the environmental laws applicable here. This was, then, a cost-recovery action without any of the procedural niceties.

The Court of Appeals' opinion is in accord with the plain language and underlying purposes of the UCPA, case law from other jurisdictions, commentators and, most importantly, common sense. As seen above, the purposes of the UCPA are to protect the landowner in a situation where government power is most intensive, in the involuntary taking of private property. While it is true that the landowner should not be unfairly enriched at the expense of the public, the touchstone of the analysis is whether the landowner is placed in the same position it would have been but for the taking. *Britton Trust*, 454 Mich 622. In our case, it is clear that under the trial court's approach, the landowner was placed in a much worse condition because of the taking.

Prior to the taking, Extrusions owned a vacant, 8-acre parcel in an area zoned for light industrial/warehouse development. There was no environmental condition on the property which would have required it to undertake remediation measures. If allowed to develop the Property, Extrusions likely would have been subject to very minor remediation costs and, indeed, under the relaxation of cleanup standards for industrial properties which occurred in 1995, probably none at all. If any environmental issues did arise, Extrusions had procedural defenses to any liability for cleanup costs, as well as the right to pursue its predecessors in title or adjoining landowners in a cost-recovery action. After the taking, however, Extrusions was essentially dunned for cleanup costs when they were deducted from the fair market value of the Property, making the Property almost worthless. This was so even though the cleanup costs were entirely theoretical,[21] and everyone agreed Extrusions had no liability for such costs.

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[21]The projected cleanup costs had nothing to do with what actually happened on the Property, since the District's use of the Property as a retention basin was clearly not the use a typical buyer would have employed. The District conceded that the highest and best use of the Property was as light industrial/warehouse. *Trial Transcript*, September 22, 2997, at 48-49 (Appellee's Appendix, 49b-50b). The projected costs were simply a theoretical construct of what the trial court concluded, without any market evidence, that a hypothetical buyer would

Clearly, Extrusions was a loser because of this taking. The UCPA cannot be construed to support such a result. After all, "[t]he law of eminent domain is a harsh remedy necessitating a strict construction of and compliance with eminent domain statutes" on the part of the agency. *C&O Railway Co*, 15 Mich App 277.

In addition, the Court of Appeals' decision is consistent with major commentators in the area, and the decision of courts in other jurisdictions. As pointed out above, the commentators have pointed out the difficulties of dealing with environmental contamination issues in the context of contamination. "[E]ven the experts find it difficult to appraise contamination . . . [s]ince the conditions and circumstances of each case are unique and environmental testing is fallible." 7A Nichols on Eminent Domain (Dec 2001) § 13B.04(1)(a) (Addendum, Exhibit T). "Estimates of the value of contaminated property are necessarily speculative." *Id* at 9. In fact, these issues are so difficult that the Appraisal Standards Board has issued an advisory opinion warning appraisers not to assume competency they might not have in appraising contaminated property and warning them that it is inappropriate to simply deduct estimated cleanup costs from the market value of the property (the exact approach taken by the trial court here). Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice* (The Appraisal Foundation, 2000), AO-09 (Addendum, Exhibit H).

Indeed, because the trial court took this disfavored approach, its decision must be reversed even if this Court were to disagree with the Court of Appeals and find that environmental contamination could be taken into account in the just compensation analysis. If such considerations are allowed, there must be some evidence or opinion given as to the impact of the environmental condition of a property on its market value, either by using comparable

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require before purchasing the Property. In effect, the trial court concluded that no one would purchase the Property unless it were completely remediated. The District never presented any evidence at trial to support such a finding.

sales or some other generally-recognized appraisal method. No one recognizes the method the trial court used here. Even MDOT admits in its *amicus curiae* brief "[n]o one could seriously argue that the only way to account for contamination is to deduct the estimated cost of cleanup." MDOT *Amicus Curiae* Brief at 12. The patent unreliability of this approach is shown by the facts of this case. The trial court found the fair market value of the Property to be $41,032, even though the assessor had valued the Property in 1993, as contaminated, at $264,600. The value found by the trial court simply strains credibility, and is not within the range of values testified to at trial. *In re Civic Center in City of Detroit*, 335 Mich 528, 534; 56 NW2d 375(1953). As such, it must be reversed.

The difficulties of dealing with environmental issues have led courts in other states to exclude evidence of contamination from just compensation trials, even in the absence of an alternative statutory procedure for dealing with such issues as was established by the 1993 amendments to the UCPA. *See discussion above of Alladin,* 562 NW2d 608, *and Dep't of Transportation ex rel People.* While there are cases that go the other way (*see Silver Creek Drain District,* 245 Mich App 568 n 12; *Northeast Ct Economic Alliance v ATC Partnership,* 256 Conn 813, 176 A2d 1068 (2001)), none of these cases arose under a statute which provided an alternative procedure for dealing with environmental issues. Certainly, in the absence of such a statute, the question of whether to admit such evidence is a close one, as evidenced by the split of authority in other states. *See,* 7A Nichols on Eminent Domain (Dec 2001) § 13B.03(1) (Addendum, Exhibit S). Where there is an alternative statutory remedy provided to the condemning agency, however, there is simply no reason to introduce the complications and undue speculation of environmental issues into the determination of market value.

Finally, the Court of Appeals' decision makes common sense. "In this endeavor [of statutory interpretation], a court should not abandon the canons of common sense." *Marquis,*

444 Mich 644. If remediation costs could simply be deducted from market value in a just compensation trial, there would never be any incentive for a condemning agency to pursue a cost-recovery action. This is because it would be more difficult, and expensive, for an agency to recover in a separate action, where it would be subject to procedural defenses (e.g., innocent landowner) and would have to establish that the expenses it sought to recover were actually incurred and reasonably necessary. If, instead, the agency could simply inject a rough estimate of projected costs into a just compensation trial and charge such costs against a landowner regardless of liability, it would probably be malpractice for its counsel to take any other route. The trial court's approach, if allowed, would simply read the reservation/waiver/escrow scheme of the 1993 amendments right out of the UCPA. Any construction which would render part of the statute surplussage or nugatory must be avoided. *Lamp v Reynolds*, 249 Mich App 591, 597; 645 NW2d 311 (2002).

II. THE DISTRICT'S ARGUMENTS THAT ENVIRONMENTAL ISSUES MUST BE PART OF THE JUST COMPENSATION ANALYSIS ARE FATALLY FLAWED

As seen above, the Legislature clearly chose to establish a separation between the issues of just compensation and environmental contamination, thereby protecting the parties and bringing predictability to the process. The District, MDOT and the Municipal League, however, urge an interpretation which would upset this careful balance and allow agencies to pursue an innocent owner for cleanup costs simply by deducting such costs from the fair market value of the property.

The District and its *amici* point to no specific language in the UCPA which enables agencies to introduce evidence of environmental cleanup costs in a just compensation trial. Instead, they construct three arguments for their interpretation:

1. The environmental condition of a property has a tendency to effect its fair market value, and therefore environmental contamination must be admissible as relevant evidence in a just compensation trial;

2. Language in the 1993 amendments allowing agencies to amend their good faith offer once a reservation of a cost-recovery action is waived or reversed show the Legislature intended environmental issues to be part of the just compensation analysis; and

3. Failure to allow environmental issues into the analysis of just compensation will artificially inflate the fair market value of properties thus impermissibly enriching owners at the expense of the public.

We will examine each of these arguments below.

A. The Fact that Environmental Contamination May Have an Effect Market Value Misses the Point of the Statutory Scheme

The District, MDOT and the Municipal League go to great lengths arguing that the presence of contamination on a property has an effect on its market value.[22] Even if true, however, that does not mean the Legislature could not determine that such issues were best dealt with in a separate proceeding and should be kept out of the just compensation analysis.

All relevant evidence is not admissible. Courts and legislatures often make policy decisions about the exclusion of relevant evidence. For example, relevant evidence is excluded if it is likely to be unfairly prejudicial or may confuse the issues (e.g., MRE 403), if it is considered inherently untrustworthy (e.g., hearsay), or for strictly policy reasons (e.g., settlement discussions).

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[22]Actually, the impact of contamination on market value has become much less significant since the relaxation of cleanup standards were adopted beginning June 5, 1995. Thus, the District's "parade of horribles" that it and other agencies will be substantially overpaying for condemned properties (and presumably will have no one to pursue for recovery of cleanup costs) is, at best, greatly overstated. In fact, this case may be the only member of a unique class where the issue has much significance at all, and in this case the issue is significant only because the condemnation occurred prior to June 5, 1995. No remediation at all would have been necessary after June 5, 1995, because of the minimal contamination on the Property, and environmental issues would not have been relevant in any just compensation determination after that date.

In the condemnation context, many types of evidence which might be technically relevant are routinely excluded because they are considered unfairly prejudicial or confusing to the determination of fair market value. The value of the property in the hands of the condemnor is excluded. *Consumers Power Co v Allegan State Bank*, 20 Mich App 720, 737; 174 NW2d 578, *aff'd*, 388 Mich 568; 202 NW2d 295 (1972). The assessed value of the property is excluded. *Jack Loeks Theatres, Inc v Kentwood*, 189 Mich App 603, 610-611; 474 NW2d 140, *vacated in non-relevant part, appeal denied in part*, 439 Mich 968; 483 NW2d 365 (1992). The change in the fair market value before the date of filing which was "substantially due to the general knowledge or the imminence of the acquisition" is excluded. MCL 213.70(1). The "general effects" of a project which are generally experienced in varying degrees by the general public or by property owners from whom no property is taken are excluded. MCL 213.70(2).

The Legislature required that environmental issues be dealt with in a separate proceeding, and therefore intended to exclude such issues from the just compensation analysis, regardless of whether such evidence is technically relevant. As seen above (Sections I.B), evidence of environmental contamination is terribly difficult to factor into a fair market determination and is beyond the capabilities of real estate appraisers, much less a jury's common pool of knowledge. In addition, if such a judgment were made in the context of a just compensation trial, it would be done on the basis of imperfect information. Important questions, such as the extent of contamination, the type of cleanup needed, when and how the clean up will be funded, and whether there are responsible third parties to collect damages from, all would likely be unanswered. This would leave the jury to speculate as to the impact of environmental issues on market value. It was this, in part, which led the Iowa Supreme Court to exclude evidence of cleanup costs from the determination of fair market value. *Alladin,* 562 NW2d 615-

616. The Michigan Legislature could, and did, conclude that such confusing and potentially unfairly prejudicial evidence should have no place in a determination of just compensation.

B. The District's Statutory Interpretation Arguments Take Clauses of the 1993 Amendments Out of Context And Ignore the Statutory Scheme

The District and its *amici* try to support their interpretation of the 1993 amendments by pointing to several sections of the UCPA which allow a condemning agency to amend its good faith offer if its initial reservation of a cost-recovery action is later reversed or waived. The right to amend, they argue, implies that the amount of the good faith offer will change depending on whether the agency has reserved its rights to bring a cost-recovery action, and, laying a further implication on this implication, that must mean the Legislature intended to give agencies the option of either pursuing environmental issues in a cost-recovery action or in the just compensation trial. This argument is specious.

First, the District makes this argument for the very first time in this appeal to the Supreme Court. Nowhere in the record below was this argument raised.[23] Arguments not raised below will not be considered for the first time on appeal to the Supreme Court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Second, Sections 5(1) and (4)(e)(iv), which provide that the appraisal and the declaration of taking each must state whether the condemning agency is reserving or waiving its

[23]The only section of the 1993 amendments raised by the District in the Court of Appeals (and then not in its brief but in oral argument) was Section 8(1) of the UCPA, which states that "[n]othing contained in this subsection (establishing the right of the agency to seek to place the amount of any good faith offer into escrow) is intended to limit or expand the owner's or agency's rights to bring federal or state cost-recovery claims." MCLA 212.58(1). The District argued this language clarified that the reservation/waiver/escrow scheme was independent of cost-recovery actions and therefore an agency could pursue either or both. The Court of Appeals was not persuaded by this argument. 245 Mich App 455.

right to bring a cost-recovery action, are simply notice requirements that mandate that the agency notify the property owner, at the outset of the case, whether it intends to pursue a cost-recovery action. MCL 213.55(1) and (4)(e)(iv). If the court reverses or the agency waives the reservation, the UCPA simply requires that the notice given to the property owner be amended to reflect that fact. MCL 213.56a. The last two sentences of Section 5(1) regarding resubmitting a good faith offer provide the same procedure for condemnations already underway at the time of the 1993 amendments. MCL 213.55(1). These sections do not state that the amount of the good faith offer must be changed.

Section 6a does not require that the agency's estimated market value can or should be adjusted, and presumably the agency would only be entitled to do so where the reservation has been reversed because the owner has admitted liability for the contamination and the cleanup costs have been ascertained. MCL 213.56a(1)(c) and (2). Otherwise, why would a homeowner or farmer, which are afforded special protections by Section 6a, ever seek a reversal of an agency's reservation and give up the due process defenses they would otherwise have? MCL 213.56a(1)(a) and (b). These homeowner/farmer protections are designed to relieve homeowners of any liability whatsoever for contamination and farmers of any liability for contamination due to generally accepted agricultural management practices. Moreover, if the election of a cost-recovery action is waived voluntarily, as happened in our case, Section 6a(3) would apply, and this section does not provide that the agency is entitled to revise its good faith offer at all. MCL 213.56a(3). Indeed, no such revision was made in the present case. After the District waived by stipulation its right to bring a cost-recovery action, it did not revise the amount of its good faith offer.[24]

[24] Even if this Court agrees with the District's interpretation of the 1993 amendments, this Court must still hold that the trial court's allowance of the testimony on contamination is impermissible under the plain language of the Section 6a(3). MCL 213.56a(3). Section 6a(3)

Section 8(2)(a), which allows the Court to release all or some of escrowed funds if the applicable statutory requirements for remediation have changed, states only that if the condemning authority's costs for cleanup have been reduced, the escrow provision must be reduced. It does not state, or even imply, that remediation costs can be introduced in the just compensation portion of the trial. MCL 213.58(2)(a). Section 8(4) (originally Section 8(3); re-numbered in 1996) provides that if the reservation is successfully challenged under Section 6(a), then all or a portion of the escrow must be broken and the money turned over to the landowner. MCL 213.58(4). The reference to "the balance" and "reduction" in Section 8(4) applies only to the limited circumstances where an agency's cost-recovery reservation is reversed by the court because an owner has admitted liability under Section 6a(1)(c), a situation not faced in this case. The language is otherwise simply meaningless when applied to the other two possible cases where a court may reverse a reservation – homeowners and farmers – who have absolute protection from environmental recovery actions by a condemning agency.

Third, none of this reflects any intent by the Legislature to allow environmental cleanup costs to be injected into a fair market value determination in the case where the agency waives its cost-recovery rights. To the contrary, the Legislature carefully constructed a balance between the rights of condemning agencies and property owners, a balance which includes the separation of environmental issues from those of fair market value. Otherwise, as the Court of Appeals correctly reasoned, what would be the purpose of the reservation and waiver procedure? "In construing statutes, the court should avoid any construction that would render a statute, or

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simply does not provide (or even imply) that an agency may revise its good faith offer after stipulating to waive its reservation of cost-recovery action as the District did in this case. Because that good faith offer forms the basis for the attorney's fees allowed to a prevailing landowner under MCL 213.66, it necessarily follows that any effect that contamination might have on market value is inadmissible where the agency has voluntarily waived its right to a cost-recovery action.

any part of it, surplusage or nugatory." *Ypsilanti Housing Com'n v O'Day*, 240 Mich App 621, 625; 618 NW2d 18 (2000).

In fact, the first version of Public Act 308 introduced to House floor as House Bill 4719 on May 6, 1993 (attached as Addendum, Exhibit O) and referred to committee on the same day did not provide for any reservation or waiver provisions. Rather, the bill provided that the agency could escrow the just compensation funds and that unless the "agency expressly requests and receives an adjudication of just compensation that calculates and apportions the [environmental] liability" no subsequent action brought by the agency against the owner would be subject to the defenses of *res judicata* or collateral estoppel. In other words, the original bill protected only the condemning agency by ensuring that no just compensation decision that did not apportion the environmental liability had *res judicata* effect on a later cost-recovery action and by ensuring that the proceeds were held in escrow to reimburse the condemning agency for its cleanup costs. In committee, substitute H-2 with the reservation and waiver procedure (attached as Addendum, Exhibit P) replaced the original bill in its entirety and nothing remains of the original bill in Public Act 308 except for the escrow concept. The District simply fails to explain why the Legislature would have moved from a simple "escrow/no *res judicata*" provision to a complex "reservation/waiver/escrow" provision unless the intent was to bifurcate the just compensation and environmental liability determinations and protect the landowner as well as the condemning agency.

The District and its *amici* also never explain what the purpose of the 1993 amendments are, if not to separate out the issues of just compensation and environmental contamination. As seen above, if agencies had the option of pursuing environmental issues in either the just compensation trial or a separate cost-recovery action, there would never be an incentive for them to pursue the latter. Thus, the entire scheme would be effectively read out of

the statute. In addition, the District and its *amici* cannot explain the purpose of provisions which give special protection to certain classes of landowners -- homeowners and farmers MCL 213.56a(1)(a) and (b). In these instances, the agency is not allowed to escrow the amount of the good faith offer, presumably because the Legislature felt that a cost-recovery action against such landowners would be unlikely or unfair. Under the District's reading of the amendments, however, an agency could turn around and charge remediation costs back against such landowners in the just compensation trial, where the landowners would have far less in the way of defenses than in a cost-recovery action. Such a result would be absurd, since it would turn the entire intent of the legislation – special protection for certain landowners – on its head.

The District cannot use certain isolated provisions (which nowhere say that agencies can pursue environmental claims in a just compensation trial) to subvert the clear intent of the Legislature to separate out issues of environmental contamination from just compensation.

C. Requiring a Separate Action for Environmental Cleanup Costs Is Not Unconstitutional and Will Not Give Landowners a Windfall

Contrary to the arguments of the District, MDOT and the Municipal League, the 1993 UCPA amendments protect an owner's right to receive the constitutionally mandated "just compensation" by being placed in a condition as good as the owner would have been in had the taking not occurred. US Const, Ams V and XIV (Addendum, Exhibit M); Const 1963, art 10 §2 (Addendum, Exhibit M); *Britton Trust*, 454 Mich 622.[25] The 1993 amendments do not violate the constitutionally-mandated award of just compensation.

Under the reservation and escrow scheme, an owner is treated exactly as it should be according to its *responsibility* for environmental contamination. If it is responsible for such

[25]This constitutional argument is yet another issue that the District raise for the first time in its appeal to this Supreme Court. The issue should be barred from review. *Booth Newspapers,* 444 Mich 234. Nonetheless, Extrusions will address this issue on the merits.

contamination, it will pay its portion of remediation costs (as determined in a separate cost-recovery action) out of the fair market valuation placed in escrow. If it is not responsible (i.e., an innocent landowner) then the owner will get the entire amount of the estimated just compensation. The condemning agency is not thereby impoverished, however. It has acquired, along with the property the owner's right to pursue responsible third-party polluters for indemnification. This right is just one stick in the "bundle of sticks" acquired by the condemning agency when it acquires titles to the land. As the District admits, if the agency incurs cleanup costs, it can sue such polluters, be reimbursed of its response costs, and be made whole. 42 USC 9607 (Addendum, Exhibit E); MCL 324.20126 (Addendum, Exhibit G); *Appellant's Brief* at 11 and 16. The 1993 UCPA amendments, then, are "just compensation neutral." They merely require that the environmental component be determined in a separate action and do not in any way impermissibly restrict the measure of just compensation. In other words, the amendments simply ensure that the landowner is dunned for cleanup costs only if it is responsible for the contamination.

The District, MDOT and the Municipal League each fails to explain why it is *unconstitutional* to exclude evidence of contamination when the condemning agency waives its right to a cost-recovery action, but *constitutional* to exclude such evidence when the condemning agency reserves its rights to a cost-recovery action. The District, MDOT and the Municipal League admit that such evidence must be excluded when a condemning agency reserves its right to a cost-recovery action. If the Legislature has the power to exclude such evidence when the condemning agency reserves its right to a cost-recovery action it must also have the power to exclude such evidence when the condemning agency waives its right to a cost-recovery action. It is the condemning agency which chooses whether it wants to preserve its cost-recovery right,

and this reservation cannot be taken away from the condemning agency except by the court proceedings authorized by Section 6a of the 1993 amendments.

But, the District, MDOT and the Municipal League argue, it is possible that an innocent landowner may get a "windfall," at the expense of the public, if the landowner has purchased the property at a bargain price (because of the presence of contamination) and the agency is unable to recoup its remediation costs because the responsible polluter cannot be found or is uncollectable.

First of all, that is not what happened in this case. Extrusions purchased the Property in 1982 for $106,000 and the trial court determined that the fair market value as "clean" in 1994 was $278,800. *Findings of Fact and Conclusions of Law,* November 6, 1997, *Findings of Fact* ¶¶ 1, 4 and 5 (Appellant's Appendix, 127a-132a). This represents an appreciation of a little over 8% per year and is only slightly higher than the $264,600 fair market value the assessor placed on the Property *as contaminated. Id; Trial Transcript,* September 22, 1997 at 25-26 (Appellee's Appendix, 47b-48b). Clearly, Extrusions would not have received a windfall if estimated cleanup costs had not been deducted from the fair market value of the Property. Worse, given the changes in environmental laws and the innovation of Renaissance Zones, Extrusions would have been in a far better position by holding the Property and not being forced to convey the Property through condemnation.

Second, it is consistent with constitutional principles of "just compensation" and the intent of the UCPA that the Legislature would have determined that this small risk (both that the owner obtained the property for a bargain price and there is no party to pursue in a cost-recovery action) should be borne by the condemning agency. Condemnation, it must be remembered, is a drastic action by the state, and the UCPA is intended to protect the rights of a property owner whose land is being involuntarily transferred. As stated by the Michigan Court

of Appeals, "the party whose property is being taken by eminent domain is entitled to the utmost protection of the Courts since the exercise of such power is drastic and should be construed in favor of the displaced landholder." *City of Muskegon v Irwin*, 31 Mich App 268. As such, the 1993 amendments should be construed in favor of the owner to avoid any construction that would allow an owner to be dunned for remediation costs it was not responsible for and would never have had to pay but for the condemnation.

Third, the District and its *amici* ignore the fact that, under their construction, it is the condemning agency, and not the owner, which is in a position to be unjustly enriched at the expense of the owner. If an innocent owner's property is valued as contaminated (as the District contends) and the responsible third party polluter is *identifiable and collectible* or if there are funds available from another governmental entity for cleanup, it is the agency that receives the "windfall," and this is a true double-recovery. In fact, 1993 PA 309 passed into law at the same time as the 1993 UCPA amendments as part of a package of "brownfield" redevelopment bills earmarked state funds to be used by local governments for this very purpose. *See* Addendum, Exhibit K. The agency gets this double-recovery because it can first "purchase" the property for its reduced value as contaminated and can then seek reimbursement for its cleanup costs from the responsible third party polluter or from a public fund created for this purpose. MDOT argues in its *amicus* brief that it would never seek such "double recovery," but cites to no law or policy that would prevent it, or any other agency, from doing so. The Legislature could not have intended to give agencies such windfalls.

Fourth, the scenario of a "windfall" to the property owner would be an extremely rare case today. Given the developments in the environmental area discussed earlier (relaxation of cleanup standards, encouragement of brownfield redevelopment, protection of innocent purchasers, etc.), the impact of environmental contamination on market value has been greatly

reduced. This is especially true for properties, such as in this case, which are zoned for industrial use in urban areas. As the District concedes on p. 29 of its Brief, nowadays the contamination is simply identified, the State is notified through a Baseline Environmental Assessment, and subsequent monitoring is done. *Appellant's Brief* at 29. Minor professional fees are all that is incurred; not cleanup costs. It is also unlikely that the State will be unable to find any responsible party on any site with significant pollution given the State's experience and success in finding responsible parties on cleanup sites and given the joint and several liability of polluters. The District's "public policy" argument on p. 35 of its Brief that unless a condemning agency can value contaminated land as contaminated the agency "will be unable to find developers interested in [brownfield redevelopment]" fails to explain how sticking the innocent landowner with the bill serves the public. *Appellant's Brief* at 35. While the landowner should not be unfairly enriched at the expense of the public, neither should the public be enriched at the expense of the landowner. *Dep't of Transp v Van Elslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

III. NEITHER THE COURT OF APPEALS' OPINION IN THIS MATTER NOR THIS COURT'S OPINION IN THIS MATTER IS ADVISORY

The District adds an argument, for the first time in this appeal, that the Court of Appeals' opinion is merely advisory because the date of taking was never determined by the trial court. The District argues that, until this date is determined, the applicability of the 1993 amendments to the UCPA is in question and the entire appeal is premature.

This argument is as bizarre as it is groundless. There is no question as to whether the 1993 amendments apply to this case. The date of taking is either June 29, 1994 (the date the District filed its Complaint for condemnation) or April 1, 1992 (the date the District sent Extrusions a letter instructing it not to develop the Property which Extrusions relied on to start its

inverse condemnation claim). The 1993 amendments apply in either case, either because the case began after the effective date of the 1993 amendments, or because the amendments applied to all then-pending condemnation actions. MCL 213.55(1). The date of taking in this case will therefore have no effect on the issues in this appeal.

Second, the trial court determined the fair market value as of the date the District filed its Complaint – June 29, 1994 (Conclusions of Law ¶¶ 7-10, November 6, 1997) (Appellant's Appendix, 127a-132a). There is no indication that the value of the Property would be different if Extrusions' inverse date of taking – April 1, 1992 – were to prevail. The only change will be the date interest begins to accrue on the award of just compensation. MCL 213.65 (Addendum, Exhibit R). Again, the issues on this appeal would in no way be affected by the date of taking as ultimately determined.

In short, the issues in this appeal regarding this interpretation of the 1993 amendments to the UCPA will remain in this case regardless of what date of taking is ultimately determined. The argument that this Court's decision regarding these issues would be premature is simply wrong.

CONCLUSION

This Court should affirm the Court of Appeals as correctly interpreting the 1993 amendments to the UCPA. The Court of Appeals correctly concluded that the statutory scheme established by the Legislature through the 1993 amendments to the UCPA separates the "just compensation" and environmental "cost-recovery" actions so that environmental contamination is not included in the fair market value analysis. This scheme protects agencies and owners, and in addition recognizes the great difficulties inherent in appraising contaminated property. All of the arguments raised by the District fail to recognize the purpose and these statutory scheme and render significant portions of the 1993 amendments meaningless.

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